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"Since that rule was first adopted and published," says the Justice, "the members of thirty-one legislatures and one constitutional convention have been elected, met and adjourned, leaving it still in force, and because thereof, despite doubts as to the wisdom of making it arbitrary, *stare decisis* compels our adherence to it now, however much plaintiff may suffer by reason thereof." At another place in his dissent Judge Simpson points out the fallacy of expecting the people to obey a rule which uselessly attempts to delay them in the ends they seek to accomplish. If these comments voice the sentiment of the judiciary of this state, then some legislative enactment would seem imperative to cure this growing injustice.

Assuming that the promulgators of the "rule" had a double reason in view, namely, the exaction of a higher degree of care from the public, and the economic necessity of the time, visualized or felt as public policy, since the railroads were recognized as public necessities, their first object has not been attained. The ever-increasing number of accidents at grade crossings bears witness to this. Nor does public policy require that the railroads should continue to be protected in this manner.

C. W. B. T.

PHYSICAL INJURY DUE TO SPOKEN WORDS.—The courts in the administration of justice must deal with all sorts and conditions of men. Mankind is made up of individuals and most cases at law present two or more individuals in some particular relationship. But the law is concerned with mankind as a whole, with the ordinary man, and its principles and rules are established for ordinary men of average mental and physical equipment.¹ Therefore the law refuses to listen to complaints based on injuries which were suffered only because of the supersensitive temperament or the abnormal physical condition of the person harmed.² In such cases it is said that the result is not to be reasonably anticipated, is unexpected and unusual; the chain of causation is beyond the control of the person at fault and the damage is too indirect and remote to create liability.

This insistence upon the average man as the norm or standard is especially important in a class of cases where the personal equation is necessarily involved, those cases in which the action is based on liability for fright, or a nervous or mental shock or mental anguish. Whether there is any liability in such cases depends first of all on the question whether an ordinary man would have sustained any injury from the alleged cause.³ "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."⁴

¹ Bouvier, Law Dictionary; see "Negligence," "Skill," etc.

² Nelson v. Crawford, 122 Mich. 466, 81 N. W. 335 (1899); Braun v. Craven, 175 Ill. 401, 51 N. E. 657 (1898).

³ Nelson v. Crawford, *supra*; Braun v. Craven, *supra*.

⁴ Kennedy, J., in Dulieu v. White, (1901) 2 K. B. 669, at page 675.

The expressions "fright," "mental anguish," and like terms are used with no apparent discrimination when the immediate effect of the wilful misconduct or negligence of the defendant is a shock to the nervous system of the plaintiff, without any direct physical impact or assault upon the body of the plaintiff.⁵

Fright and nervous shock, if no other injury is sustained, are not enough in themselves to form the basis of an action for damages.⁶ This is because a claim based on fright or nervous shock, without any resulting or attendant physical injury is hard to disprove and the courts look with suspicion on such cases. It is almost impossible to establish fraud under such circumstances, however strongly suspected. All the evidence is in the mind of the plaintiff, and, if such cases were actionable, the court would be forced to rely solely on his veracity.

When physical injury follows as a natural consequence of fright, nervous shock or mental anguish, the plaintiff has a much better claim to present. He has evidence to offer as to how seriously he was harmed by the defendant's tort. But here the cases make a distinction between negligent acts and wilful acts as a cause of the physical injury to the plaintiff. Whether an act of negligence on the part of the defendant, resulting in a nervous shock to the plaintiff which is attended by physical injury, is actionable has been a much disputed question. "A recovery has been allowed by the Court of King's Bench in England, . . . the Supreme Courts of Texas, Minnesota and South Carolina. A recovery has been denied by the Privy Council, England, and the Supreme Courts of New York, Pennsylvania and Massachusetts."⁷ The conflict of opinions seems to be due to the fact that the courts approach the problem with different conceptions of legal injury and proximate cause.

But when the fright and the resulting physical injury are occasioned by a deliberate and wilful tort, it is well settled that an action will lie.⁸ Any act done with the malicious purpose of frightening the plaintiff and which could be reasonably calculated to cause physical injury because of a shock resulting therefrom, would be a sufficient foundation for such a case. It has been held that spoken words, if maliciously made and if they could be reasonably expected to frighten a person, are actionable if they did cause physical harm.⁹

Interest in this whole problem is revived by the decision in *Janvier v. Sweeney and Barker*,¹⁰ where the court held that the

⁵ 5 Columbia Law Rev. 179.

⁶ Burdick's Torts, 3rd Ed., Sec. 11, p. 113; 14 L. R. A. 666 and cases therein cited; *Railroad Company vs. Dalton*, 65 Kan. 661, 70 Pac. 645 (1902).

⁷ Francis H. Bohlen in 50 Am. Law Reg. 141 and cases therein cited; 22 L. R. A., N. S., 1073.

⁸ *Preiser v. Wielandt*, 48 App. Div. N. Y. 569, 62 N. Y. S. 890 (1900); *Watson v. Dilts*, 116 Iowa 249, 89 N. W. 1068 (1902).

⁹ *Wilkinson v. Downton*, 76 L. T. R. 493 (Eng. 1897).

¹⁰ 121 L. T. R. 179 (Eng. 1919).

plaintiff could recover for physical injury caused by threats and spoken words. There was no evidence that the plaintiff was in obvious ill-health or of extreme nervous temperament. The case shows how far the court can go in establishing liability under such circumstances and yet stay well within the precedents. The defendant Barker told the plaintiff that he represented the military authorities and that she was wanted because she had been corresponding with a German spy. The jury found that the statements were calculated to cause physical injury to the plaintiff and were maliciously made, with the knowledge that they were likely to cause such damage.

The decision is in accord with the rule that when a person has been frightened wilfully and intentionally and he suffers a physical injury which could be inferred as likely to result therefrom, he can recover. Moreover the English court had authority almost exactly in point with the principal case: the case of *Wilkinson v. Downton*,¹¹ in which the defendant intended to subject the plaintiff to fright which, in the opinion of the jury, was so severe that an ordinary man would realize that it might and would occasion serious physical consequences to the plaintiff. The court, in the case under discussion, followed the previous decision and quoted it. The only distinction between the two cases being that, in the principal case, while the defendant's conduct was a wrong in itself in that the threats were made to the plaintiff to induce her to steal from her employer letters which the defendant wanted to obtain, his conduct was not a wrong towards the plaintiff apart from the tendency to cause fright, while in the *Wilkinson* case the defendant had, as a joke, practiced fraud on the plaintiff by telling her that her husband had been seriously injured in a railway accident. The case under discussion therefore goes further than the previous decision, in that here there was no wrong done to the plaintiff apart from the tendency of the defendant's words to cause her physical injury through fright which he wilfully intended to create in her.

There is no logical reason why the connection between certain statements made to a person and the illness of that person should be considered too remote for the law to be concerned with. "Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace in regard to the damage *propter hoc* in a necessary or natural descent from the wrongful act."¹² In the case of *Dulieu v. White*,¹³ Kennedy, J. cites an unreported case, *Smith v. Johnson & Co.*, referred to in *Wilkinson v. Downton*, in which a bystander suffered serious physical illness from horror due to witnessing an accident

¹¹ *Supra*.

¹² Kennedy, J., in *Dulieu v. White*, *supra*, at p. 678.

¹³ *Supra*, at p. 675.

caused by the defendant; he distinguishes this case from *Dulieu v. White* on the ground that the defendant was guilty of no wrong to the plaintiff, since there was no reason to anticipate at the time he was guilty of the negligence which caused the accident, that the accident would be of such a terrible nature that a mere bystander would be so shocked at seeing the accident as to suffer physical injury. Whereas in *Dulieu v. White* the conduct of the defendant threatened direct physical injury to the plaintiff and so was wrongful to him, apart from the mere possibility that he would be so seriously frightened as to be physically injured.

Spoken words can easily start a train of events which ends in physical injury and it is often easy, in cases like the one under discussion, to trace the physical injury by natural steps back to the words used. When one considers that England was at war at the time, it is not strange that the woman was greatly frightened; an ordinary person would be certain to suffer a shock from such an accusation, and that illness resulted is not at all surprising. Add to these factors the elements of malicious purpose and knowledge that such accusations were likely to cause physical injury, facts found by the jury, and the conclusion is evident: if the physical illness was the direct result of the nervous shock caused by the statements made to her by the defendant, the plaintiff had a right to recover. "The true question would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead in the plaintiff's case to the physical effects complained of."¹⁴ All of these things were found in the case under discussion.

Cases, in which physical injury resulting from spoken words is made the cause of an action, are rare. When the words are not spoken directly to the plaintiff, an action based on illness or shock resulting therefrom may be denied without conflict with the principal case, on the ground that there is no misconduct towards the person injured.¹⁵ But when the words are spoken to the plaintiff wilfully and with an intention of causing fright, then there is no reason why the usual rules for tort liability should not be applied, and if a case is made out, the fact that spoken words were the origin of the injury should not affect the result. The rules are broad enough to include such a case and, in England at least, there is authority for such a decision.

E. L. P.

THE BURDEN OF PROOF WHERE THERE HAS BEEN LOSS BY BAILEE.—Agistment, both at common law and by statute, is universally treated and considered as one species of bailment, and

¹⁴ Pollock, *Torts*, 9th Ed., 53.

¹⁵ *Bucknam v. Great Northern Ry.*, 76 Minn. 373, 79 N. W. 98 (1899); *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740 (1900).